Suresh a/l Munadas v Menteri Dalam Negeri Malaysia & Ors

HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATION NO MT(4)44–156 OF 2008
NALLINI PATHMANATHAN JC
2 DECEMBER 2008

Administrative Law — Exercise of administrative powers — Detention order — Applicant unable to be present for hearing on date fixed due to illness — Chairman of advisory board subsequently decided not to proceed with review — Whether amounted to arbitrary act — Whether chairman contravened s 7 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969

Administrative Law — Remedies — Habeas corpus — s 6(3) of the Dangerous Drugs (Special Preventive Measures) Act 1985 — Detention order — Deposition of Deputy Minister — Detention order was to enable Attorney General to commence prosecution against applicant for contravention of restricted residence order — Whether Deputy Minister acted ultra vires powers

Preventive Detention — Detention order — Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 — Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Restricting movement order made pursuant to s 6(3) of the Dangerous Drugs (Special Preventive Measures) Act 1985 still subsisting when detention order made — Whether s 13F(2) of the 1969 Ordinance had been breached — Whether issuance of detention order wrong in law — Whether issue of writ of habeas corpus warranted

The applicant was currently detained at the Pusat Pemulihan Akhlak Kamunting, Perak under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 5 1969 ('Ordinance'). Earlier, he was detained at the Pusat Pemulihan Akhlak Simpang Renggam and the detention was for a period of two years since 9 July 2006. The detention order was to have expired on 9 July 2008, but on 7 July 2008, he was served with an order extending the duration of the detention order for a further period of two years, until 7 July 2010. Prior to the issuance of the detention order under s 4 and its extension under s 7 of the Ordinance, an order was made against him pursuant to s 6(3) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') restricting his movements to the district of Mukim Lumut, Daerah Manjung, Perak for a period of two years

commencing from 24 December 2005 and expiring on 24 December 2007. In this application, the applicant contended that the detention order was unlawful for the following reasons: (i) that at the time of the detention order under s 4 of the Ordinance, another order under s 6(3) of the Act was subsisting and effective, and as such the issuance of the detention order was wrong in law; (ii) that the provision of s 13F(2) of the Ordinance had been breached, as the Minister failed to revoke the restricted residence order under the Act prior to the issuance of the detention order; (iii) that the Deputy Minister had acted ultra vires the powers, in that he had issued the detention order with the express purpose of enabling the Attorney General to commence prosecution against the applicant for contravening the provisions of the restricted residence order under s 6(3) of the Act, subject to the Attorney General's powers under art 145 of the Federal Constitution; and (iv) that the chairman of the advisory board, having exercised his discretion to hold a review in relation to the detention order against the applicant, subsequently decided not to proceed with the review when the applicant could not be present on the date fixed for the hearing as he was ill. It was contended that this amounted to an arbitrary act, in contravention of s 7 of the Ordinance.

Held, allowing the application:

(1) The Ordinance, save for s 13F, does not deal with the Act or other preventive detention or restricted residence legislation. The Act however, expressly provides in s 6(5) that orders under the Act may be made against a person notwithstanding that immediately, or at any time before his detention under the Act, that person has been detained under s 4 or 4A of the Ordinance, on grounds which are wholly or partly the same or similar to the grounds of detention under the Act. In other words, where a detention order under the Ordinance subsists or is imposed at the same time as a detention under the Act, such an order under the Act is valid. It follows that there is no express provision prohibiting the Minister from exercising his discretion to issue orders under different statutes, based on different facts. In fact, the provisions of the Act appear to expressly recognise the power of the Minister to do so (see paras 8, 9, & 10).

(2) In the instant case, the two orders were not orders of preventive detention. One was of restricted residence and the other of preventive detention. Therefore, there appeared to be no prohibition against the two orders subsisting or overlapping each other over a specific period of time. Thus, there was no breach or contravention or invalidity in law occasioned by the fact that the Ministers issued the detention order when the restricted residence order was still subsisting (see para 10).

(3) The words 'in accordance with the Ordinance' under ss 7C and 7D of the Ordinance denote the fact that where the Minister acts in accordance with the powers accorded to him under the Act, no judicial review can lie. But where he has not acted in accordance with the Act, it follows that judicial review may lie. In the instant case, by deposing on oath to the fact that he issued the detention order because he wanted the applicant to be prosecuted for contraventions of the restricted residence order, rather than for the objectives stated in the Ordinance, the Deputy Minister had expressly admitted that the reasons for the exercise of his discretion fell outside the purview of the Ordinance. Thus the detention order was invalid on this ground (see paras 24–25).

(4) Section 7(2) of the Ordinance envisages that the chairman of an advisory board retains or possesses the discretion to decide whether or not to review a detention order that is in force. He may therefore choose to either hold a review hearing or not hold a review hearing during the subsistence of a detention order. The section provides that upon the discretion vested in the chairman being exercised to hold the review, the review should proceed and a written report with recommendations follow. In the instant case, the applicant was unable to be present at the hearing in Simpang Renggam as he was ill. In the circumstances, the applicant had been deprived of the opportunity of presenting his case for the consideration of the advisory board at the review hearing. As such the provisions of s 7 of the Ordinance had not been complied with (see paras 27–30).

[Bahasa Malaysia summary

Pemohon kini sedang ditahan di Pusat Pemulihan Akhlak Kamunting, Perak di bawah s 4(1) Ordinan 5 Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969 ('Ordinan'). Sebelum itu, dia telah ditahan di Pusat Pemulihan Akhlak Simpang Renggam dan penahanan tersebut adalah untuk tempoh dua tahun sejak 9 Julai 2006. Perintah penahanan tersebut telah luput pada 9 Julai 2008, namun pada 7 Julai 2008, dia telah diserahkan dengan perintah melanjutkan tempoh perintah penahanan tersebut untuk tempoh dua tahun lagi, sehingga 7 Julai 2010. Sebelum perintah penahanan tersebut dikeluarkan di bawah s 4 dan lanjutannya di bawah s 7 Ordinan, satu perintah telah dibuat terhadapnya menurut s 6(3) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta') menghadkan pergerakannya dalam daerah Mukim Lumut, Daerah Manjung, Perak bagi tempoh dua tahun bermula dari 24 Disember 2005 dan tamat tempoh pada 24 Disember 2007. Dalam permohonan ini, pemohon menegaskan bahawa perintah penahanan tersebut menyalahi undang-undang kerana alasan-alasan berikut: (i) bahawa pada masa perintah penahanan di bawah s 4 Ordinan dibuat, satu lagi perintah di bawah s 6(3) Akta masih wujud dan berkuat

kuasa, dan oleh itu perintah penahanan yang dikeluarkan adalah salah di sisi undang-undang; (ii) bahawa peruntukan s 13F(2) Ordinan telah dilanggar, memandangkan Menteri telah gagal untuk membatalkan perintah kediaman terhad di bawah Akta sebelum perintah penahanan tersebut dikeluarkan; (iii) bahawa Timbalan Menteri telah bertindak ultra vires kuasanya, yang mana beliau telah mengeluarkan perintah penahanan tersebut dengan tujuan nyata untuk membolehkan Peguam Negara memulakan pendakwaan terhadap pemohon kerana melanggar peruntukan perintah kediaman terhad di bawah s 6(3) Akta, tertakluk kepada kuasa Peguam Negara di bawah perkara 145 Perlembagaan Persekutuan; dan (iv) bahawa pengerusi lembaga penasihat, yang melaksanakan budi bicaranya mengadakan semakan berkaitan perintah penahanan tersebut terhadap pemohon, kemudiannya memutuskan untuk tidak meneruskan dengan semakan itu apabila pemohon tidak hadir pada tarikh yang ditetapkan untuk perbicaraan kerana tidak sihat. Ia dihujahkan bahawa ini merupakan tindakan sewenang-wenangnya, bertentangan dengan s 7 Ordinan.

Diputuskan, membenarkan permohonan:

(1) Ordinan tersebut, kecuali s 13F, tiada kaitan dengan Akta atau apa-apa perundangan penahanan pencegahan atau kediaman terhad yang lain. Walau bagaimanapun Akta tersebut dengan jelas memperuntukkan dalam s 6(5) bahawa perintah-perintah di bawah Akta boleh dibuat terhadap seseorang meskipun dengan segera, atau pada bila-bila masa sebelum penahanannya di bawah Akta tersebut, seseorang itu telah ditahan di bawah s 4 atau s 4A Ordinan atas alasan yang keseluruhan atau sebahagiannya sama dengan alasan penahanan di bawah Akta tersebut. Dalam erti kata lain, di mana perintah penahanan di bawah Ordinan wujud atau dikenakan pada masa yang sama dengan penahanan di bawah Akta, perintah di bawah Akta tersebut adalah sah. Oleh itu tiada peruntukan nyata menghalang Menteri daripada melaksanakan budi bicaranya untuk mengeluarkan perintah-perintah di bawah statut yang berbeza, berdasarkan fakta-fakta yang berbeza. Bahkan, peruntukan-peruntukan Akta tersebut dilihat jelas mengenalpasti kuasa-kuasa Menteri untuk berbuat sedemikian (lihat perenggan 8, 9 & 10).

(2) Dalam kes ini, kedua-dua perintah tersebut bukan perintah-perintah penahanan pencegahan. Salah satu merupakan kediaman terhad dan satu lagi merupakan penahanan pencegahan. Oleh itu, tidak terdapat halangan terhadap kedua-dua perintah tersebut untuk terus wujud atau bertindan antara satu sama lain untuk tempoh masa tertentu. Justeru itu, tiada pelanggaran atau percanggahan atau ketidaksahan di sisi undang-undang yang timbul berdasarkan fakta bahawa Menteri

tersebut mengeluarkan perintah penahanan walhal perintah kediaman terhad masih lagi wujud (lihat perenggan 10).

(3) Perkataan-perkataan 'in accordance with the Ordinance' di bawah ss 7C dan 7D Ordinan menandakan fakta bahawa di mana Menteri bertindak menurut kuasa-kuasa yang diberikan kepadanya di bawah Akta, tidak boleh ada semakan kehakiman. Namun di mana beliau tidak bertindak menurut Akta, maka semakan kehakiman boleh dilaksanakan. Dalam kes ini, dengan mengangkat sumpah terhadap fakta bahawa beliau telah mengeluarkan perintah penahanan tersebut kerana hendak pemohon didakwa kerana melanggar perintah kediaman terhad, dan bukan untuk tujuan yang dinyatakan dalam Ordinan, Timbalan Menteri dengan jelas mengakui bahawa alasan-alasan untuk melaksanakan budi bicaranya di luar ruang lingkup Ordinan. Maka perintah penahanan tersebut tidak sah atas alasan ini (lihat perenggan 24–25).

(4) Seksyen 7(2) Ordinan membayangkan bahawa pengerusi lembaga penasihat mengekalkan atau memiliki budi bicara untuk memutuskan sama ada atau tidak untuk menyemak perintah penahanan yang berkuat kuasa. Beliau oleh itu boleh memilih sama ada untuk mengadakan semakan pendengaran atau tidak mengadakan semakan pendengaran semasa perintah penahanan tersebut wujud. Seksyen tersebut memperuntukkan bahawa atas budi bicara yang diberikan kepada pengerusi, semakan hendaklah diteruskan dan diikuti dengan laporan bertulis berserta saranan. Dalam kes ini, pemohon tidak dapat hadir untuk pendengaran di Simpang Renggam kerana tidak sihat. Dalam keadaan ini, pemohon telah dinafikan peluang mengemukakan kesnya untuk pertimbangan lembaga penasihat semasa semakan pendengaran. Oleh itu peruntukan s 7 Ordinan tidak dipatuhi (lihat perenggan 27 – 30).]

Notes

For cases on detention order, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 22–23.

For cases on detention under Dangerous Drugs (Special Preventive Measures) Act 1985, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1360–1365.

For cases on habeas corpus, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 580–634.

Cases referred to

Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors, Re [1976] 2 MLJ 83, HC (refd)

Chotka Hembram v State of West Bengal & Ors AIR 1974 SC 432, SC (refd)

Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 3 CLJ 931, FC (refd)

A *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor v Mohd Zambri bin Mohd Ariffin* [1990] 1 MLJ 102, SC (refd)
Pe Long @ Jimmy & Ors; Pe Long & Ors v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors, Re [1976] 2 MLJ 133, HC (refd)
Vincent Cheng v Minister for Home Affairs & Ors [1990] 1 MLJ 449, HC
B (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 6(3), (5), (6), 25
Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 4,
C 4(1), 4A, 7, 7(2), 7C, 7D, 13F, 13F(2), (3)
Federal Constitution art 145
Internal Security Act 1985 [Singapore]

Suresh Thanabalasingam (Suresh Thanabalasingam) for the applicant.
Najib Zakaria (Senior Federal Counsel, Attorney General's Chambers) for the
D *respondents.*

Nallini Pathmanathan JC:

E **[1]** Suresh a/l Munadas ('Suresh') is now detained at the Pusat Pemulihan Akhlak Kamunting, Perak under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). He has been detained both at Kamunting and initially at the Pusat Pemulihan Akhlak Simpang Renggam for a period of more than two years since 9 July 2006. The
F detention order was to have expired on 9 July 2008, but on the 7 July 2008, Suresh was served with an order extending the duration of the detention order for a further period of two years, until 7 July 2010. Prior to the issuance of this detention order under s 4 and its extension under s 7 of the Ordinance, an order had been made against Suresh pursuant to s 6(3) of the
G Dangerous Drugs (Special Preventive Measures) Act 1985 ('the DDA') restricting his movements to the district of Mukim Lumut, Daerah Manjung, Perak for a period of two years commencing from 24 December 2005 and expiring on 24 December 2007.

H **[2]** In this application, Suresh seeks relief against the detention made under the Ordinance ('the detention order'), contending that it is unlawful on the following grounds:

(i) At the time when the detention order under s 4 of the Ordinance was
I made against Suresh, another order under s 6(3) of the DDA ('the restricted residence order') was subsisting and effective, and as such the issuance of the detention order was wrong in law;

(ii) Section 13F(2) of the Ordinance has been breached, as the Minister failed to revoke the restricted residence order under the DDA prior to the issuance of the detention order;

(iii) The Deputy Minister has acted ultra vires the powers accorded to him under the Ordinance, in that he has deposed to the fact that he issued the detention order with the express purpose of enabling the attorney-general to commence prosecution against Suresh for contravening the provisions of the restricted residence order under s 6(3) of the DDA, subject to the attorney-general's powers under art 145 of the Constitution.

(iv) The chairman of the advisory board, having exercised his discretion to hold a review in relation to the detention order against Suresh, subsequently decided not to proceed with the review when Suresh could not be present on the date fixed for the hearing as he was ill. This, it is contended, amounts to an arbitrary act, in contravention of s 7 of the Ordinance.

Each of these grounds will be considered individually.

Grounds (i) and (ii): At the time when the detention order was made against Suresh, the restricted residence order was subsisting and effective, and as such the issuance of the detention order was wrong in law; and s 13F(2) of the Ordinance has been breached, as the Minister failed to revoke the restricted residence order under the DDA prior to the issuance of the detention order

[3] These grounds are premised on the basis that two orders, one of preventive detention and one of restricted residence, issued under two different statutes cannot subsist together. The applicant also argues that there should have been a revocation of the restricted residence order prior to the issuance of the detention order, in accordance with the express provisions of s 13F(2) of the Ordinance. It provides as follows:

(2) When any person who is subject to an order (in this sub-section referred to as the 'earlier order') under s 2 or 2A of the Restricted Residence Enactment (FMS Cap 39] or to a direction under any of the provisions mentioned in sub-section (3) is ordered to be detained under section 4, the earlier order or the direction as the case may be, shall cease to have effect on the date when the detention order comes into force

[4] Subsection 13F(3) refers to the following provisions:

(3) The provisions referred to in sub-section (2) are —

(a) section 295 of the Criminal Procedure Code;

A (b) section 12 of the Criminal Procedure Code of the former Straits Settlements;

(c) section 247 of the Criminal Procedure Code of Sabah;

(d) section 247 of the Criminal Procedure Code of Sarawak.

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[5] It is contended for Suresh that it is only in the express situations set out above, that the earlier order of restricted residence or a direction under the provisions of the Criminal Procedure Code stand revoked. The said C provisions do not cover s 6(3) of the DDA. As such the restricted residence order against Suresh subsisted and was effective at the time the detention order was issued. As such, it is argued, there should have been an express revocation of the earlier restricted residence order, otherwise both orders subsisted for a specific period of time, and this is not tenable as it is incorrect D in law. The consequences for the detainee, it is argued, would be invidious, as he would not know which order to comply with.

[6] The applicant relies on the Indian authority of *Chotka Hembram v State of West Bengal & Ors* AIR 1974 SC 432 in support of this contention, E submitting that there are no local authorities on point.

[7] In reply the respondents submitted that the Minister is, and was at liberty to issue any detention order regardless of orders made prior to that. It was further contended that there is no condition precedent or legal obligation F imposed on the part of the Minister to revoke the first order made before issuing the second order. It was pointed out that both the orders in the instant case were premised on different facts, unlike the situation in *Chotka Hembram* (above) where the court found that the second order made was invalid as it was based on the same, or identical facts. Section 13F, it was G contended, imposes restrictions on the validity of certain orders specified in that section, but is silent in relation to the DDA. It does not prohibit the said order from continuing to take effect. Therefore the two orders could subsist together. As for the contention that the detainee would be unable to comply with one of the orders, as in the instant case, opening him up to prosecution, H the respondents contended that the detainee could not be penalised for failing to comply with one order when he was in fact, physically detained lawfully under preventive detention legislation. This would afford him a full defence.

I **[8]** The first issue that arises is whether the detention order and the restricted residence order can subsist in law at the same time. The Ordinance, save for s 13F, does not deal with the DDA or other preventive detention or restricted residence legislation. The DDA however, expressly provides in s 6(5) that orders under the DDA may be made against a person

notwithstanding that immediately, or at any time before his detention under the DDA, that person has been detained under s 4 or 4A of the Ordinance, on grounds which are wholly or partly the same or similar to the grounds of detention under the DDA. In other words, where a detention order under the Ordinance subsists or is imposed at the same time as a detention under the DDA, such an order under the DDA is valid. Section 25 of the DDA also expressly provides that:

> For the avoidance of doubt it is hereby declared that nothing contained in this Act shall in any manner whatsoever derogate from the provisions of the Ordinance in its application to any person who has been or is associated with any activity relating to or involving the trafficking in dangerous drugs under the Dangerous Drugs Act 1952

[9] Although not directly on point, it is evident that the provisions of the DDA are expressly intended not to interfere with, or impinge on the powers of the Minister under the Ordinance. The Minister is at liberty to exercise his discretion under the Ordinance to detain persons found to be trafficking in drugs as such activity has been said to 'strike at the very core of public order, and any person indulging in such activities must necessarily be acting in a manner prejudicial to public order' (see *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83; *Re Pe Long @ Jimmy & Ors; Pe Long & Ors v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 133 (HC); *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor v Mohd Zambri bin Mohd Ariffin* [1990] 1 MLJ 102).

[10] As such it follows that there is no express provision prohibiting the Minister from exercising his discretion to issue orders under different statutes, based on different facts. In fact, the provisions of the DDA appear to expressly recognise the power of the Minister to do so. Moreover in the instant case, the two orders are not orders of preventive detention. One is of restricted residence and the other of preventive detention. There therefore appears to be no prohibition against the two orders subsisting or overlapping each other over a specific period of time. Unlike the Indian case of *Chotka Hembra* (above), where the detention order was issued on the same or identical facts on two separate occasions, in the instant case it is clear that the restricted residence order was issued on one set of facts and the detention order on another. In any event s 6(5) of the DDA appears to provide even for that situation, where the facts giving rise to the issuance of orders under the different statutes, are partially or wholly similar. I therefore conclude that there appears to be no breach or contravention or invalidity in law occasioned by the fact that the Minister issued the detention order when the restricted residence order was still subsisting (in this context, s 6(6) of the DDA provides that the Minister may at any time and from time to time, vary,

revoke or cancel orders made under the DDA and until he so does, the original order continues in force for the unexpired period of time. This further supports the contention that DDA orders continue to subsist unless expressly revoked, varied or cancelled).

[11] The second ground put forward was that there was a breach of s 13F of the Ordinance. In other words, the applicant seeks to argue that as the section makes no mention of orders issued under the DDA, albeit of detention or restricted residence, it follows that the restricted residence order does not stand revoked and therefore subsists which is bad in law. While I am in agreement with the reasoning that the restricted residence order does not stand revoked, I am unable to agree that it then follows that both orders cannot subsist side by side in law. The reasons are as outlined above.

[12] Finally on this ground, the contention that the application would be in an invidious position if both orders subsist, as he would be unable to comply with both, requires consideration. This fact in itself cannot lead inexorably to the conclusion that the Minister's powers are accordingly curtailed. It would require express provision in the respective statutes to expressly curtail or limit the Minister's powers thus, particularly where there is express provision allowing for the issuance of detention orders under the DDA where orders under the Ordinance subsist or had previously been made or are to be made. It would therefore follow conversely, that where there is an order subsisting under the DDA, an order under the Ordinance may be made provided it is made in accordance with the provisions of the Ordinance.

[13] As for the potentially invidious position of the detainee who would not know which order to follow, the practical reality is that the order of detention would prevail and afford a complete defence in the event of any attempt made to prosecute the detainee for a failure to comply with the second or other order. Accordingly, this ground also fails.

Ground (iii): The Deputy Minister has acted ultra vires the powers accorded to him under the Ordinance, in that he has deposed to the fact that he issued the detention order with the express purpose of enabling the attorney general to commence prosecution against Suresh for contravening the provisions of the restricted residence order under s 6(3) of the DDA, subject to the attorney general's powers under art 145 of the Constitution

[14] In para 9 of his affidavit dated 2 September 2008, the Deputy Minister of Home Affairs states that he issued the detention order against Suresh with the express purpose of enabling him to be prosecuted in court for contravening the conditions of the restricted residence order subject to the

decision of the attorney general under art 145 of the Federal Constitution. In other words the main purpose for the issuance of the detention order under the Ordinance was to enable a prosecution of the detainee for alleged contravention of the terms of his restricted residence order which had been issued earlier.

[15] As a consequence of this statement, it is contended on behalf of Suresh, that the Minister has acted ultra vires his powers in issuing the detention order, in that it is not in accordance with, nor falls within the scope of, s 4(1) of the Ordinance.

[16] The respondents, in response to the applicant's contention of the Minister having acted ultra vires the powers vested in him under s 4(1) of the *Emergency Ordinance,* contend that the Minister's exercise of his power is a subjective exercise of his discretion which cannot be examined by the courts. It is also contended that the prosecution of the detainee for contravention of the terms of his restricted residence order was only one of several reasons for the detention.

[17] What then is the position in law?

[18] Section 4(1) of the Ordinance provides:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a 'detention order') directing that that person be detained for any period not exceeding two years.

[19] The said section envisages that the Minister can exercise his discretion to issue a detention order where he is satisfied that it is necessary to prevent a person from acting in a manner prejudicial to public order, or to suppress violence or for the prevention of crimes involving violence. The stated objective above does not fall within any of the purposes specified in s 4(1).

[20] In *Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 3 CLJ 931 the Federal Court dealt with this issue thus:

> *... Two things should not be confused. First the power of the attorney general to institute criminal proceedings and secondly the power of the Minister to make a detention order. The power to institute criminal proceedings lies with the attorney general and is provided by art 145(3) of the Federal Constitution ... On the other hand, power to order detention under the Ordinance lies with the Minister by virtue of s 4(1) of the Ordinance which has been reproduced.*

A These are two distinct powers under two different laws. The attorney general and the Minister respectively have power given to them by the respective laws. So, just as the attorney general has power to institute proceedings but not the power to order detention, the Minister has power to order detention but not to institute proceedings. Just as it is not within the power of the attorney general to consider making an order of detention, it is also not within the power of the Minister to consider the institution of criminal proceedings. *What is the purpose of considering doing something that they, respectively have no power to do? Indeed, if the Minister considers the institution of criminal proceedings, in a judicial review application, it would not be surprising to hear arguments that the Minister has exceeded his jurisdiction or that he has taken into consideration matters which he should not ...*

[21] In short, where the Minister has acted ultra vires the scope of his powers under the Emergency Ordinance, judicial review lies.

[22] In the Singapore case of *Vincent Cheng v Minister for Home Affairs & Ors* [1990] 1 MLJ 449, Lai Kew Chai J considered the provisions of the Singapore Internal Security Act (Cap 143, 1985 Ed) and upheld the detention as being valid. In the course of his judgment, he commented on the effect of the Minister acting ultra vires the powers of the enabling legislation thus:

... In relation to the first submission it was repeatedly stressed that the challenge is not directed against the merits of any decision taken or act done within jurisdiction; the challenge is against any decision taken or act done for purposes not authorised by the ISA and were therefore nullities. Mr Beloff said that the amendments to the ISA had precluded any judicial review of any decision or act taken or done within jurisdiction, whatever are the merits, but he pointed out that the amendments did not exclude review of any decision or act taken or done outside and beyond the jurisdiction conferred by the ISA. He rhetorically asked whether a red-haired person could be arbitrarily arrested under the ISA, which, of course, is an absurd suggestion because how is the executive to state the grounds and the allegations of fact? ... He then referred to the case of *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and claimed that the errors committed by the executive in this case was of the kind which was described by Lord Reid at p 171B–E, and which went to the jurisdiction conferred on the executive by the ISA. *It was observed that Anisminic [1969] 2 AC 147 was decided before 13 July 1971 and that the ouster clause in that case, which he contended was materially similar to s 8B(2), was ineffective in excluding judicial review on the simple premise that Parliament could not have intended that the Foreign Compensation Commission could act outside its legislation mandate.* Reference was also made to *Endell Thomas v A-G of Trinidad and Tobago* [1982] AC 113 where the Privy Council dealt with an ouster clause in a Constitution and approved the *Anisminic* [1969] 2 AC 147 principle. *It is plain that this principle, where it applies is quite incontrovertible. A court of law must be able to see where a tribunal or an executive authority has exceeded its constitutional or legislative mandate, which Parliament itself would have contemplated or condoned, and order the appropriate relief ...*

[23] The principle is clear. Where the body or person empowered under the statute acts outside the scope of powers granted by the statute then its or his act is ultra vires and amounts to a nullity, allowing judicial review to lie. A

[24] What about ss 7C and 7D of the Emergency Ordinance which precludes judicial review? A reading of the section reveals that judicial review is prohibited or excluded in respect of '... any act done or decision made by the Yang di Pertuan Agong or the Minister in the exercise of their discretionary power *in accordance with this Ordinance ...'* B

C

[25] The words 'in accordance with the Ordinance' denote the fact that where the Minister acts in accordance with the powers accorded to him under the Act, no judicial review can lie. But where he has *not* acted in accordance with the Act, it follows that judicial review may lie. In the instant case, by deposing on oath to the fact that he issued the detention order because he wanted Suresh to be prosecuted for contraventions of the restricted residence order, rather than for the objectives stated in the Emergency Ordinance, the Deputy Minister has expressly admitted that the reasons for the exercise of his discretion fall outside the purview of the Ordinance. For this reason judicial review is not prohibited as borne out by *Lee Kew Sang* (above) and this ground succeeds. The detention order is invalid on this ground. D E

Ground (iv): The chairman of the advisory board, having exercised his discretion to hold a review in relation to the detention order against Suresh, subsequently decided not to proceed with the review when Suresh could not be present on the date fixed for the hearing as he was ill. This, it is contended, amounts to an arbitrary act, in contravention of s 7 of the Ordinance F

[26] On 10 June 2008, the advisory board sent a notice to Suresh stating that a hearing would be held to review the detention order made against him on 12 June 2006 in Simpang Renggam. Suresh is held at Kamunting, Perak. On 12 June 2006 however, the board was advised vide a memo that Suresh could not be present at the review hearing as he was ill and receiving treatment at the Klinik Kemta Tempat Tahanan Perlindungan Kamunting. The board then decided that no review hearing would be conducted in respect of the detention order against Suresh. The complaint of the detainee is that there has been a breach of s 7 of the Ordinance, in that the chairman of the board, having exercised his discretion to have a review, cannot then choose not to proceed with the review. The respondents in response contend that the said section accords a full discretion to the chairman to do as he sees fit in relation to a review hearing. Section 7 of the Ordinance provides as follows: G H I

A Every detention order *may*, so long as it shall remain in force, *be reviewed from time to time by an Advisory Board at the discretion of the Chairman thereof.*

The Advisory Board shall on completing every review under sub-section (1) forthwith submit to the Minister a written report of every such review, and may make therein such recommendations as it shall think fit.

B

[27] The section envisages that the chairman of an advisory board retains or possesses the discretion to decide whether or not to review a detention order that is in force. He may therefore choose to either hold a review or C hearing or not hold a review hearing during the subsistence of a detention order. What however is the position after he has exercised that discretion one way or the other? In the instant case, what is the position after he has exercised his discretion to hold a review hearing? The section does not go further to provide any further discretionary powers. The section envisages in D s 7(2), clearly in the event that the discretion is exercised to proceed with a review, that the advisory board submit a written report of the review with a recommendation. In short, the section provides that upon the discretion vested in the chairman being exercised to hold the review, the review should proceed and a written report with recommendations follow.

E

[28] A distinction therefore has to be drawn between the position prior to the chairman exercising his discretion and after he has done so. Prior to the exercise of his discretion, he may indeed choose not to review a detention order or to do so, and no complaint may arise. Where however he has F exercised his discretion such that a review hearing is to be proceeded with, such a review hearing should be held and a report submitted. To state otherwise would mean that the advisory board could arbitrarily choose to commence review hearings at will and then abandon them for a variety of reasons. This does not appear to be the purpose of s 7.

G

[29] The facts are even more compelling in the instant case, where the applicant was unable to be present at the hearing in Simpang Renggam as he was ill in a clinic in Kamunting, Perak. The applicant has been deprived of the opportunity of presenting his case for the consideration of the advisory H board at the review hearing.

[30] As such the provisions of s 7 of the Ordinance have not been complied with. This amounts to a breach of s 7, and this ground also succeeds.

I

[31] For the reasons set out above, Suresh has succeeded in the third and fourth grounds raised. His application is therefore allowed and a writ of habeas corpus issued with immediate effect.

Application allowed.

Reported by Ashgar Ali Ali Mohamed